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Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners,
v.
ROBERT M. BRACKER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. PREEMPTION BY FEDERAL REGULATION OF INDIAN TIMBER

The State of Arizona continues to hide its candle under a bushel basket. We search the State's brief in vain to find any specific and substantial interests of the State of Arizona which might weigh in favor of the State's claim to collect these taxes. Nor does the State discuss the specific objectives of federal timber regulation which are fully documented in the Brief for Petitioners, pp. 27-36.

The State notes that Congress has instructed the Secretary of the Interior to deduct from proceeds of tribal forestry programs funds to reimburse the United States for its substantial services provided to such programs. (Brief for Respondents, p. 6 n. 4 and p. 8) It then seems to argue that since the Congress authorized the United States to charge the Tribe for substantial services rendered, it must

also be consistent with the legislative objectives for the State to charge the Tribe for no services rendered. The logic of this argument is elusive. Rather, the opposite conclusion should be drawn from the premise.

The State endorses the argument advanced by the court below that the *de facto* economic burden upon the Tribe from these taxes is without legal significance. (Brief for Respondents, pp. 9 and 16-17.) Respondents rely on cases arising under the constitutional rule that states are permitted to levy nondiscriminatory taxes against persons who deal with the United States even though the economic burden of those taxes passes to the United States. Those cases do not offer an appropriate analogy to the preemption and infringement problems before the Court in this case.

The constitutional rule that mere economic burden upon the United States from nondiscriminatory state taxation of federal contractors will not invalidate those state taxes is, by definition, a rule of constitutional law to govern only when Congress has not by legislation prescribed a different rule. *United States v. County of Fresno*, 429 U.S. 452, 460 (1977); *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941). By contrast, the problem before the Court in this case is precisely to determine the nature and effect of legislation and legislative policies.

Congressional policies which are largely economic are at the heart of the preemption problem before the Court. To refuse consideration of the true economic consequences of state taxes in resolving a legislative preemption question dealing with economic policies is to refuse to give weight to the very factors which are pertinent to the legislative purposes.

The attempted analogy to federal contractors also overlooks a crucial specific difference in the two situations. That is the quasi-territoriality of federal Indian law and policy. The fact that these activities occur entirely within the Indian reservation is highly significant for purposes of Indian law because the reservation boundary is in many

respects a territorial boundary — marking the primary locus of the effectuation of federal Indian policies in general and of tribal self-government in particular. To the extent this quasi-territoriality is a feature of federal Indian law, situs of the activity on the reservation counts for a quantum reduction in the substantiality of the State's basis for taxing authority. There is no analogous principle impinging upon general state taxation of federal contractors, and thus the states enjoy a presumptively expansive taxing authority over persons notwithstanding their federal dealings. But for purposes of federal Indian law and policy, the reservation boundary does have meaning. State taxation of federal contractors is particularly not analogous to state taxation affecting federal Indian programs because of the unique significance of reservation situs in Indian cases.

The state also argues that the legal incidence of these taxes upon a non-Indian corporation is controlling and that further inquiry into the ill effects of such taxation upon congressional regulatory schemes is not permitted. (Brief for Respondents, pp. 10-11 & n. 11.) The State argues that the fact that the burden of the taxes is "shifted" from Pinetop to the Tribe "as a normal incident of contractual negotiation" rather than as a requirement of state law immunizes it from further scrutiny for preemption purposes. If that argument is good, then *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), must be overruled *in toto* since in that case the legal incidence of the tax fell on the non-Indian retailer and was not required by state law to be passed on to the Indian buyer.

The significant fact with respect to the true economic burdens of the taxes is that the Tribe as a matter of economics has no choice but to agree to pay the taxes in the future. As a contractor with the Tribe, Pinetop sells services to the Tribe on a cost-plus-profit basis. No logger would enter into such contracts with the Tribe except on the assumption that the agreed-upon compensation would

be adequate to meet foreseeable expenses and to provide a sufficient entrepreneurial return. These State taxes, if upheld, become just one more identifiable cost which must be recouped by the loggers from the Tribe.

The State indulges in a mathematical shell game at pages 10-11 respecting the economic impact of these taxes on this Tribe. The Brief for Petitioners, pp. 15-16, shows that the actual taxes paid under protest by Pinetop Logging Company do not accurately reflect the total economic impact upon the Tribe of the collection of these taxes from its loggers. Only one of six such loggers is a party to this lawsuit. Similar refund actions have been brought by other loggers but have been stayed pending the outcome of this suit, which the parties have treated as a test case. (*Id.* at 3.)

Yet the State implies, in bold disregard of those facts, that the amount of taxes paid under protest by Pinetop Logging Company alone ought to be considered the full measure of the economic impact upon the Tribe of these taxes on its loggers. (Brief for Respondent, pp. 10-11 and n. 16.)

The Petitioners believe the true total effect of these taxes falls between $20,000 and $50,000 a year. The present discounted value of such exactions ranges from hundreds of thousands of dollars to more than a half-million dollars.

One should not make too much of the State's failure to acknowledge the full impact of these taxes upon the Tribe. Even at $9,000 annually the impact is significant. That amount alone would be enough to employ a member of the Tribe and thus to allow an entire family to remain on the reservation rather than abandon their home, relatives, and traditional culture for the sake of decent employment. Hopefully, the State of Arizona does not really mean to suggest to this Court that the avoidance of that misfortune is a "trivial and insubstantial" accomplishment of the purposes of Indian timber regulation. (*Cf.* Brief for Respondents, p. 9.)

II. INFRINGEMENT OF TRIBAL SELF-GOVERNMENT

Though the State asserts the Tribe's infringement claim is grounded on "largely illusory concerns" (Brief for Respondents, pp. 13-14), the State declines to rebut or even mention any of the specific claims of infringement stated at pp. 52-55 of the Brief for Petitioners.

The State suggests that the infringement question is "far more subtle, complex and difficult" than the Petitioners allow and that the questions are "confusing and complicated." But the State does not offer a "more subtle" analysis to better accommodate the difficulty of the problem. Instead, it offers a far blunter resolution: that the infringement doctrine should never concern itself with the reality of harm to tribal government as long as the State does that harm by laws whose legal incidence falls immediately on non-Indians. (Brief for Respondents, pp. 16-17.) Arizona's proposed resolution for these "complex and difficult" disputes is that Arizona should always win, provided only that it writes its laws to hurt the Indians by hitting the non-Indians.

Though the State dislikes the word "overrule", this is in reality a request that *Williams v. Lee*, 358 U.S. 217 (1959), and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 179 (1973), be overruled to the extent they hold states are not permitted to infringe on tribal self-government even under the guise of regulating the non-Indian aspects of joint Indian/non-Indian activities on the reservation.

Weightier reasons than simply Arizona's naked request should be required for partial overrulings of *Williams* and *McClanahan*.

III. THE BUCK ACT

The principal burden of the Respondents' Brief is that, even though the Petitioners' preemption and infringement claims may otherwise be valid, the Arizona use fuel tax and motor carrier license tax are expressly authorized by the

Hayden-Cartwright Act, 4 U.S.C. § 104, and the Buck Act,[1] 4 U.S.C. §§ 105 *et seq.*, respectively. The State of Arizona references its brief in the tandem case of *Central Machinery Co. v. State of Arizona*, No. 78-1604, where it argues the same point with respect to the Buck Act.

The State's submission with respect to the Buck Act admittedly would require an overruling of the construction given that statute in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 691 n. 18 (1965) and repeated in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

The Appellants' Reply Brief in No. 78-1604 establishes from its legislative history that the Buck Act was intended to leave state taxation on Indian reservations as it was before the Act, neither taking from the Indians any immunity or measure of tribal self-government nor granting any new immunities to non-Indian commerce not affecting the rights of Indians. Rather than burden the Court with repetition, the Petitioners adopt the discussion of the Buck Act presented in the Reply Brief in No. 78-1604 (including the submission that the State of Arizona is collaterally estopped from relitigating this point of law in this Court for a third time in fifteen years).

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[1] By the terms of the Buck Act, the Arizona use fuel tax could not come within the Buck Act's general authorization of "any sales or use tax" (4 U.S.C. § 105(a)) since that phrase is defined in 4 U.S.C. § 110(b) so as to exclude motor fuel taxes which are addressed by the Hayden-Cartwright Act. The Senate Report on the Buck Act confirms that "any State tax which is imposed on sales of gasoline and other motor-vehicle fuels will continue to be imposed on such sales in Federal areas under the provisions of section 7 of the committee amendment [the amended Hayden-Cartwright Act], rather than under the provisions of section 1 of the committee amendment [4 U.S.C. § 105]."
S. Rep. No. 1625, 76th Cong. 3d Sess., 5 (1940) (cited hereinafter as S. Rep. No. 1625).

One point merits elaboration beyond what is said in the Reply Brief in No. 78-1604. The Buck Act speaks solely to the problems created by the exclusions of state law which derive *merely* from situs of the taxed event on a federal area. Such exclusion occurs on exclusive federal enclaves. The result as evidenced in the hearings[2] and the Senate committee report was to create privileged exemptions from state taxes which were unrelated to any federal purpose, pointlessly destructive of the state's revenue-raising ability, and whimsically allocated among the public.

The Buck Act was meant to end that problem, and that problem alone, with respect to sales, use, and income taxes. The Senate report made this clear when it said:

> Section 1 (a) of the committee amendment removes the exemption from sales or use taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based *solely* on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. *At the present time exemption from such taxes is claimed on the ground that the Federal Government has exclusive jurisdiction over such areas.*
>
> . . .
>
> Section 2 (a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based *solely* on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. S. Rep. No. 1625, 2, 3 (emphasis supplied).

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[2] Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. (1940) (hereinafter cited as "Hearings").

The immunity of Indians or non-Indians from state taxes on Indian reservations does not arise *solely* from the situs on an Indian reservation. Indian reservations are not areas in which the Federal Government has exclusive jurisdiction. *Draper v. United States,* 164 U.S. 240 (1896); *Utah & N. Ry. Co. v. Fisher,* 116 U.S. 28 (1885). Rather, the immunity, when it applies, of Indians or non-Indians from state taxes on Indian reservations arises from independent federal sources. Those grounds are specific federal statutes, comprehensive and preemptive legislative schemes, executive regulations, and the "judicially made Indian law"[3] which fills in the interstices of the treaties, statutes, and executive pronouncements. To be sure, locus on an Indian reservation is usually an important or even essential element of the claim to immunity from state taxation based on federal Indian law principles. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). But the immunity is not "based solely on the ground" of the situs of the taxed event; nor does it flow from the extraterritoriality jurisprudence of exclusive federal enclaves. Rather, it flows from the conjunction of locus on an Indian reservation *and* other substantive federal laws and policies mandating the immunity.

The Senate report made it perfectly clear that the Buck Act does not repeal other substantive federal laws and policies mandating immunities from state taxes when it said:

> The section will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred. S. Rep. No. 1625, 2.

This language is sufficient to establish that Congress intended to affect no substantive federal rules except the sometimes rule that *mere* situs in a federal area may exclude state jurisdiction to tax. But, as is shown in the Reply Brief in No. 78-1604, Congress went further in 4 U.S.C.

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[3] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S. Ct. 1011, 1019 (1978)

§ 109 to specify that among the other bodies of federal law unaffected by the Buck Act was the law of the immunity of "Indians not otherwise taxed." But even that cautionary drafting was unnecessary since the initial thrust of the Act as expressed in the Senate Report did not purport to reach any other body of federal law immunities.

That is precisely the point of this Court's alternative holding in *Warren Trading Post Co.* that, even if the Buck Act generally includes Indian reservations within its definition of "federal areas", the Buck Act would not override the specific tax immunity otherwise inferable from the trader regulations. 380 U.S. at 691 n. 18. By the same logic, the Buck Act could not override the Petitioners' immunity from the Arizona motor carrier license tax independently mandated by preemptive federal regulation of Indian timber or by the infringement doctrine.

In summary, though the language of the Buck Act may have been drafted with less than perfect precision, the intended meaning of the language is laid bare in the Senate report. The Act removes only one weight from the scale — mere situs on a "federal area". Where the tax immunity claim has nothing remaining to weigh in its favor, the scale tips against the claim. Where the claim is supported by other sources of federal law as well, those other principles of federal law continue to control.

IV. THE HAYDEN-CARTWRIGHT ACT

The State's principal defense of its use fuel tax is the Hayden-Cartwright Act (Brief for Respondents, pp. 19-23), which has never been construed by this Court.

The Brief for Petitioners remarks by footnote that the Hayden-Cartwright Act's seemingly general consent to State motor fuel taxes on "military or other reservations" might not apply at all to Indian reservations. The State responds to that remark. (Brief for Respondents, pp. 19-23.) However, the point presented in detail by the Petitioners, and the only point which must be reached in this case, is whether the Hayden-Cartwright Act permits state motor

fuel taxation on tribal (not state) roads on the reservation when used by the Tribe itself, through its agents, on its own business. The State's brief declines to respond to that argument in any significant way. Thus, it may be assumed *arguendo* for purposes of this case that Indian reservations are not excluded *per se* from the Act's consent to state taxation.[4] The crucial question then is the one the State does not discuss.

A. The General Objective of the Act was Only to Remove the Situs Barrier to State Motor Fuel Taxation.

The entire relevant legislative history of Section 10 of the Hayden-Cartwright Act is presented in the Brief for Petitioners, pp. 56-60.[5] It is sparse compared to that of the Buck Act. However, some secondary evidence of the intent of the earlier Act can be found in the legislative history of the nearly contemporaneous Buck Act. The Hayden-Cartwright Act was frequently referred to as the precedent for removal of the purely territorial barrier to state taxation which flows from exclusive federal jurisdiction over an area. S. Rep. No. 1625, 2, 4, 5; Hearings, 4, 7, 10, 20, 21, 22.

Congressman Buck himself viewed his bill as "only an extension of the principle involved in that act [the Hayden-Cartwright Act]." Hearings, 4.

Though this evidence is hardly conclusive, it does tend to show that the Hayden-Cartwright Act was considered to be in the same vein as the Buck Act, which, as has been shown, did not upset independent federal immunities from state taxation but rather removed the defense to state taxation flowing solely from the situs of the transaction on a federal reservation. If the Hayden-Cartwright Act is thus read *in pari materia* with the Buck Act, then it should be presumed that it was not intended to repeal the otherwise preemptive force of Indian timber regulation.

[4] Pinetop has elected to pay Arizona taxes allocable to its fuel use on state roads. (App. 11.) The Petitioners do not choose to litigate the taxability of their use of state roads, and that question has never been at issue in this case.

[5] We have also examined Senator Carl Hayden's papers collected at the Hayden Library at Arizona State University. Though more than a dozen files deal directly or indirectly with the Hayden-Cartwright Act, we find no reference to Indian reservations in connection with § 10 of the Act.

However, it does strongly appear that, unlike the Buck Act, the Hayden-Cartwright Act evidences one substantive policy: the fair allocation of *state* road use tax burdens to all private users of those *state* roads. (*Cf.* Brief for Petitioners, pp. 58-59.)

That specific federal substantive policy might fairly be taken to override other conflicting policy-based federal immunities from states taxes (such as the *per se* immunities of Indians from all state taxation on the reservation). By definition, that substantive objective cannot clash with other federal immunities against taxation of use of tribal roads rather than state roads. At least with respect to fuel used on tribal roads there is no conflict between the preemptive effect of Indian timber regulation and the apparent purpose of the Hayden-Cartwright Act to prevent tax-free use of state highways. The State has made no attempt to show how the apparent objective of the Hayden-Cartwright Act to correlate benefits and burdens of state road use would be achieved by allowing states to derive windfall revenues from the use of tribal roads by tribal agents.

B. The Act Literally Does Not Sanction Taxation of Pinetop's Fuel Consumption Because Pinetop's Fuel Is Not "Sold By or Through" an Agency Located on the Reservation.

The simple purpose of the Act to eliminate the defense of situs of *sale* of the fuel on a federal reservation is reflected in the literal language of the Act, which states:

> All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage or use of gasoline or other motor vehicle fuels may be levied in the same manner and to the same extent, with respect to such fuel *when sold by or through* post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, *and other similar agencies, located on United States military or other reservations*. . . . (Emphasis supplied.)

Furthermore, subsection (b) of the statute requires "[t]he officer in charge of such reservation" to submit a monthly statement to the state tax authorities "showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month." This obligation can only be carried out with respect to fuel sold on the federal reservation.

In this case, the motor fuel the use of which Arizona seeks to tax is not "sold by or through . . . agencies located on United States military or other reservations." Rather, it is purchased in interstate commerce and trucked to the reservation for storage and use. This case does not fall within the literal scope of the Act's consent to taxation. That

should be the end of the inquiry.[6]

C. The Administrative Interpretation Relied Upon by the State Supports the Tribe and Pinetop Rather Than the State of Arizona

The State's principal discussion of the Hayden-Cartwright Act is its endorsement of the analysis of the Act set out in an opinion of the Solicitor of the Department of the Interior, 57 Interior Dec. 129 (1940).

That opinion concluded that the Act's reference to "United States military or other reservations" included Indian reservations, though the indications favoring the conclusion were "slight". 57 Interior Dec. at 139. Thus, sales of motor fuel on the reservation to private persons, Indian or non-Indian, were held taxable by the state.

The Solicitor's opinion does not discuss the possible application of the Act to taxation of motor fuel used on tribal roads rather than state roads. Therefore, the opinion does not undercut at all Petitioners' contention that the Act cannot be construed to validate collection of the Arizona use fuel tax from Pinetop Logging Company.

The Interior Solicitor's opinion states two other conclusions fatal to the State's position in this case. The first is that the Hayden-Cartwright Act does not validate state taxation of motor fuel used on Indian reservations but not "sold by or through" reservation agencies:

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[6] The State relies upon *Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P.2d 748 (1946) as stating that the Hayden-Cartwright Act authorizes state motor fuel taxation of use of fuel on federal enclaves even though not purchased on the enclave. This statement was dictum since the fuel in question was otherwise purchased within the state and apparently would have been taxable at that point of sale. Furthermore, *Sanders* did not involve Indian reservations or any independent basis of federal immunity from state taxation, such as preemption from comprehensive timber regulation.

Better reasoned authority counter to *Sanders* is *State v. Yellowstone Park Co.*, 57 Wyo. 502, 121 P.2d 170, 171 (1972) ("the term 'sales' or 'when sold' are terms too plain to be construed away by a court").

(3) The Act of Congress of June 16, 1936, above quoted, does not change this conclusion since, in the first place, it applies only to gasoline *sold* through commissaries and like agencies on the reservation. It does not appear that the gasoline purchased from wholesalers and dealers for the operations of the mills is sold to the mills through the commissary or any like agency on the Menominee Reservation. 57 Interior Dec. at 138.

Furthermore, the Interior Solicitor's opinion expressly holds that the Hayden-Cartwright Act does not authorize state taxation of gasoline purchased and used in the Menominee tribal timber enterprise.

The opinion notes "several holdings by the Department that State gasoline taxes need not be paid in connection with purchases of gasoline for tribal enterprises (letter to Superintendent of the Great Lakes Agency approved by the Department June 21, 1938; departmental telegram to the Navajo Agency of August 1, 1938; memorandum of the Commissioner of Indian Affairs from the Solicitor, of December 3, 1938 and June 21, 1939)." 57 Interior Dec. at 138.

Thus, the Solicitor's opinion would expressly exempt from the Hayden-Cartwright Act "gasoline for tribal enterprises." In this case also the motor fuel is used directly in the business of the tribal timber enterprise by the Tribe's own agents.

In summary, there are at least three distinct reasons why the Hayden-Cartwright Act does not validate the state fuel use taxes at issue in this case. The first reason is that the fuel in question was not "sold by or through . . . agencies located on United States military or other reservations." The second reason is that the legislative history shows the Act to have been intended at most to authorize state taxation of motor fuel used in connection with state roads. The third reason is that, consistent with the administrative interpretation endorsed by the Respondents themselves, motor fuel used directly in connection with tribal enterprises is implicitly excluded from the scope of the Hayden-Cartwright Act's consent to state taxation.

D. In the Absence of Clear Legislative Intent, Principles of Construction Preclude the Destruction of Indian Tax Immunities By Inference

The foregoing discussion of the literal terms of the Act and of its legislative purposes ought to be sufficient without recourse to the canons of construction to reject the State's invocation of the Hayden-Cartwright Act in this case. However, if the direct textual and historical evidence is not dispositive, then the canons of construction surely are.

Those principles are conveniently summarized in *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 96 S. Ct. 2102, 2113 (1976):

> Finally, in construing this "admittedly ambiguous" statute, *Board of County Comm'rs v. Seber,* 318 U.S., at 713, 63 S.Ct. at 925, we must be guided by that "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington,* 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S., at 174, 93 S.Ct., at 1263; *Squire v. Capoeman,* 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956); *Carpenter v. Shaw,* 280 U.S. 363, 366-367, 50

S.Ct. 121, 122-123, 74 L.Ed. 478 (1930). "This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-614, 63 S.Ct. 1284, 1291, 87 L.Ed. 1612 (1943) (Murphy, J., dissenting).

Surely the evidence that Congress might have contemplated authorization of state taxation of an Indian tribe's own use of its own roads when it enacted the Hayden-Cartwright Act is less substantial than the evidence that Congress contemplated the application of state personal property tax laws to reservation Indians when it enacted 28 U.S.C. § 1360(a).

The Hayden-Cartwright Act falls far short of the clear legislative statement necessary for repeal of Indian tax immunities, especially with respect to tribal use of tribal roads.

CONCLUSION

The judgment below should be reversed and remanded with instructions to grant judgment for the Petitioners for refund of the taxes paid under protest.

Respectfully submitted,

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